

ESTATE OF RICHARD LIP
AND
ESTATE OF RILEY M. GLENN

IBIA 87-16, 87-17

Decided February 3, 1987

Appeals from an order approving will issued by Examiner of Inheritance Richard B. Denu in Indian Probate B(1)-61-58, file 8835, and an order determining heirs issued by Administrative Law Judge Garry V. Fisher in Indian Probate IP BI 340C 78.

Appeals docketed and denied.

1. Administrative Procedure: Generally--Appeals--Indian Probate:
Appeal: Generally--Indians: Generally

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

2. Indian Probate: Appeal: Standing to Appeal--Indian Probate:
Rehearing: Generally

A person who fails to file a proper petition for rehearing with the Administrative Law Judge lacks standing to appeal to the Board of Indian Appeals.

3. Indian Probate: Reopening: Standing to Petition for Reopening

An adult who participated in the original probate hearing into a deceased Indian's estate lacks standing to petition for reopening.

APPEARANCES: Margaret Glenn, pro se.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE LYNN

On December 16, 1986, the Board of Indian Appeals (Board) received a notice of appeal in two Indian probates from Margaret Glenn (appellant). Appellant seeks review of the estates of Richard Lip (Lip) and Riley M. Glenn (Glenn). These appeals are hereby docketed under Docket Nos. IBIA 87-16 and 87-17, respectively. For the reasons discussed below, the appeals are denied.

Background

Lip, Oglala Sioux Allottee No. 3932, of the Pine Ridge Indian Reservation in South Dakota, died testate on March 7, 1958, at the age of 86 years. Because Lip owned land in Indian trust status, a hearing to probate his trust estate was held before Departmental Examiner of Inheritance Richard B. Denu on May 21, 1958. By order dated June 11, 1958, Examiner Denu approved Lip's February 17, 1957, Last Will and Testament, and ordered distribution of decedent's estate in accordance with the will's provisions.

Interested parties, including appellant here, were given written notice of the order. Attached to the order was a notice stating in pertinent part:

This decision becomes final 60 days from the date of this notice. Any person aggrieved by the decision of the examiner may, within the 60 days, but not thereafter, file with the superintendent a written petition for rehearing. The petition must be under oath and must state specifically and concisely the grounds upon which it is based. If the petition is based upon newly discovered evidence, it must state a justifiable reason for the failure to discover and present the evidence at the hearing, and the petition must be accompanied by the sworn statement of at least one disinterested person having knowledge of the facts. The superintendent shall promptly forward the petition to the examiner of inheritance.

The probate record in Lip's estate contains no petition for rehearing. The record does contain a July 9, 1958, letter from appellant to the Commissioner of Indian Affairs expressing concern about actions taken by the Oglala Sioux Tribal Court in regard to Lip's non-trust personal property. Appellant, however, raised no objections to the Departmental probate of Lip's trust estate. The Commissioner investigated the tribal court action on appellant's behalf, and the tribal court ultimately relinquished jurisdiction in favor of state court probate. However, because Examiner Denu's decision was never challenged, it became final on August 11, 1958.

Glenn, Unallotted Oglala Sioux No. U-9581, also of the Pine Ridge Reservation, died on December 17, 1977, at the age of 58 years. Administrative Law Judge Garry V. Fisher held hearings to probate Glenn's Indian trust estate on May 16 and October 25, 1978, and April 18, 1979. Although a document purported to be Glenn's Last Will and Testament was introduced at the hearings by appellant, Judge Fisher specifically found that the document was not a will, but rather was a power-of-attorney. In an order dated May 5, 1981, Judge Fisher found that Glenn had died intestate and determined his heirs in accordance with the laws of South Dakota, the State in which the real property was located.

Interested parties, including appellant, were given written notice of Judge Fisher's order. Attached to the order was a notice which stated in pertinent part:

This decision becomes final sixty (60) days from the date of mailing of this notice unless within such period a written petition for rehearing shall have been filed with the Superintendent by an aggrieved party in accordance with the provisions of 43 CFR 4.241.

The petition for rehearing must be under oath and must give a concise but complete statement of the grounds upon which it is based. If it is based upon newly discovered evidence, it shall be accompanied by the affidavits of witnesses stating fully what the new testimony is to be. The petition shall include the petitioner's justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision.

No claims shall be paid and no distribution shall be made during the pendency of proceedings following the filing of a petition for rehearing, except as specifically authorized by the undersigned.

The probate record in Glenn's estate also shows that no petition for rehearing was filed. Therefore, Judge Fisher's decision became final on July 6, 1981.

Appellant's notices of appeal in the two estates were received by the Board on December 16, 1986. Appellant states she was not informed of her right to appeal the orders. The Board requested copies of the probate records in the estates from the Aberdeen Land Titles and Records Office, Bureau of Indian Affairs. The copies were received on December 29, 1986.

Discussion and Conclusions

[1] Normally, appellants before the Board are given a briefing schedule in accordance with the provisions of 43 CFR 4.311. However, in this case, the facts asserted by appellant in her notices of appeal and contained in the administrative records, as discussed below, show that under no circumstances is there a right of appeal. Accordingly, these cases will be addressed without further briefing. Cf. Estate of Richard Burke (Thompson), 9 IBIA 75 (1981).

[2] Duly promulgated Departmental regulations in effect when the decisions in these cases were issued required that a petition for rehearing be filed before there was any right of further appeal. See 43 CFR 4.241 and 4.320 (1981); 25 CFR 15.17 and 15.19 (1958). Because no petitions were properly filed, no right to further appeal arose, and the judges' decisions became final. Estate of Nellie Brown, 11 IBIA 1, 3 n.2 (1982), Estate of Ralyen or Ralyea Voorhees, IA-L-2 (1969); Estate of Jason Betzinez (Betzines), IA-1302 (1965). ^{1/} Had appellant filed a petition for rehearing, she would have been advised of her right to seek additional review at the conclusion of that proceeding.

^{1/} This rule is still in effect. See 43 CFR 4.241 and 4.320.

[3] Furthermore, appellant has no standing to seek reopening of these estates. Under 43 CFR 4.242(h), governing reopening of estates closed for more than 3 years, the petitioner must show that he or she "had no actual notice of the original proceedings." Appellant here not only had actual notice of the original proceedings, she was an adult and actively participated in both hearings. Accordingly, she lacks standing to petition for reopening. Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (1985); Estate of Julia Tieyah, 11 IBIA 211 (1983), and cases cited therein; Brown, supra.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's notices of appeal from Examiner Denu's June 11, 1958, order approving will and Judge Fisher's May 5, 1981, order determining heirs are denied.

Kathryn A. Lynn
Acting Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge